No. 89-292

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ESTATE OF JACK GILPIN

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Respondents.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION OF RESPONDENT AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

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INTRODUCTION

Petitioner, Estate of Jack Gilpin, hereby replies to the Brief in Opposition of Respondent American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME").[1]

[1]The other respondents, the State respondents, did not file any opposition to the petition for a writ of certiorari.

ARGUMENT

AFSCME presents two arguments against granting certiorari and vacating the judgment and opinion of the court of appeals in accordance with *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950). First, it argues that its unilateral action has not mooted the case. Second, it misstates the law and contends that a case that becomes moot after a court of appeals decision, but does not otherwise raise any issue warranting Supreme Court review, is not eligible for the *Munsingwear* rule. Neither argument is correct.

1.a. AFSCME suggests that its unilateral payment of $233.78 to petitioner does not moot this case because it was less than one third of the $788.03 in fair share fees and interest that had been collected from Mr. Gilpin over three years.[2] Likewise, AFSCME incorrectly claims "there is nothing in the petition suggesting that the restitution claim for these fees has been abandoned."[3]

In clear and unmistakable terms the Estate of Jack Gilpin stated in its petition: "Petitioner has accepted this payment as *complete settlement* of *all* outstanding claims. Consequently, there no longer is a live controversy between the parties . . . ."[4] AFSCME cannot now complain because its unilateral attempt to moot one of the years, by refunding the entire fee for that year,[5] resulted in mooting

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[2]Brief in Opposition at 5-6 & nn. 2, 4.

[3]Brief in Opposition at 6 n.4.

[4]Petition for a Writ of Certiorari at 5 (emphasis added).

[5]AFSCME described its actions in its Brief in Opposition at 6 (emphasis added): "AFSCME refunded to *each* of the plaintiffs the 1% of 1986-87 fees found in excess of the proper fair share fee amount in the arbitration proceeding. In addition, *to preclude the*

all of the years when petitioner accepted AFSCME's unexpected, generous payment[6] as complete settlement of the entire case and controversy.

Plaintiff is master of his complaint and remains so at the appellate stage of the litigation.[7] Petitioner is completely satisfied with the amount of restitution provided by AFSCME's unilateral refunding of a portion of the fees collected. When petitioner makes such a decision "there is no longer a case or controversy before [the Court] . . . [and] the controversy . . . is now moot."[8]

1.b AFSCME criticized petitioner's counsel, Mr. Chappell, for "dismiss[ing] the claims of Mr. Gilpin's fellow named plaintiffs"[9] just because AFSCME differs with the conclusion reached by Mr. Chappell in satisfying his "Rule 11 obligations" by interpreting and applying this Court's

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need for further litigation with the plaintiffs, AFSCME refunded the *entire fee* for 1987-88; a year in which this case was still pending in the district court . . . ."

[6]The 1987-88 year for which AFSCME refunded the entire fee to avoid further litigation was the only year for which the courts had consistently upheld the constitutionality of AFSCME's collection scheme. *See* Appendix to Petition for a Writ of Certiorari at 3a, 10a-12a (court of appeals); 30a-33a (district court); Brief in Opposition at 3.

[7]*Webster v. Reproductive Health Services*, ___ U.S. ___, 109 S. Ct. 3040, 3053 (1989); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987).

[8]*Webster*, 109 S. Ct. at 3053; *see also Deakins v. Monaghan*, 484 U.S. 193, 199-201 (1988) (plaintiffs' willingness to withdraw their claims from federal court after a decision by the court of appeals and no longer seek any relief in federal court extinguishes any live controversy between the parties and makes plaintiffs' claims moot).

[9]Brief in Opposition at 7.

recent decision in *Torres v. Oakland Scavenger Co.*,[10] and the Seventh Circuit's application of *Torres* in *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*[11]

AFSCME's criticism is a cheap shot.[12] It is also an irrelevant tangent because AFSCME sent similar refund checks to the other named plaintiffs.[13] Accordingly, even if *Torres* had not prevented all plaintiffs from being petitioners herein, this case would still be moot because *all* plaintiffs received AFSCME's unexpected and unilateral refunds which far exceeded the 1% AFSCME previously had obligated itself to return.[14]

AFSCME also argues that the class certification issue is not moot because any petitioner could have continued the class certification claims, even though his substantive claims were moot, or members of the proposed class could have intervened to petition for review of the denial of the

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[10] ___ U.S. ___, 108 S. Ct. 2405 (1988).

[11] 857 F.2d 1176 (7th Cir. 1988).

[12] AFSCME's suggestion of a different conclusion is based on a *Sixth Circuit* decision directly contrary to the Seventh Circuit on this specific point. Obviously, counsel litigating in the Seventh Circuit must rely upon Seventh Circuit cases in exercising his "Rule 11 obligations," not Sixth Circuit cases.

[13] Petition for a Writ of Certiorari at 4-5; Brief in Opposition at 5-6.

[14] The other plaintiffs were informed of Mr. Chappell's legal conclusion regarding *Torres* and the effect of accepting AFSCME's unilateral refund check on their claims. They were also informed of the position petitioner would take in the petition. No plaintiff objected or sought other counsel.

class.[15] However, neither event occurred,[16] thereby leaving the class issue moot.[17]

2. AFSCME argues that cases which: a) become moot after a court of appeals decision but before the granting of a petition for certiorari and b) do not also raise any substantive issue warranting review, should not receive the *Munsingwear* treatment. Instead, AFSCME contends the certiorari petition should be denied, leaving the court of appeals' decision standing.[18]

AFSCME's position has been consistently rejected by this Court. First, in both of the cases previously cited to show mootness when plaintiffs decide not to pursue a

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[15]Brief in Opposition at 8.

[16]Mr. Chappell informed those potential class members for which he had addresses of the denial of the class certification by the court of appeals. He requested anyone who wanted to appeal the denial to contact him. No potential class member did so. Accordingly, petitioner decided not to pursue its claim for class certification.

[17]*Cf. Davis v. Ball Memorial Hospital Ass'n*, 753 F.2d 1410, 1416 (7th Cir. 1985) (in applying mootness principles of *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980) applicable to class actions in which the claims of all the named plaintiffs but not all members of the class have become moot the court found that the issues presented are still "live" and not moot by the attempted intervention of unnamed class members, by the refusal of a tender of settlement or by the appeal of denial of class certification by the named plaintiffs); *see also Webster*, 109 S. Ct. at 3047-48, 3053-54 (named plaintiffs decided to withdraw some of their claims for declarative relief from their federal *class* action after court of appeals decision); *Deakins, supra*. Here, of course, there was no attempted intervention by other putative class members, and the union paid all named plaintiffs in the action to their satisfaction.

[18]Brief in Opposition at 8-11.

claim on appeal, this Court applied the *Munsingwear* rule.[19]

Second, the Court has rejected Justice Stevens' view that the petition for a writ of certiorari should be denied and *Munsingwear* not followed when "harm would [not] flow . . . if . . . the judgment of the Court of Appeals [were to] stand [and] there is no particular justification for this Court's intervention",[20] or "a highly technical and totally harmless error" is involved which would needlessly increase the Court's workload.[21]

Third, AFSCME made the following four arguments against the application of *Munsingwear*: the case became moot prior to ruling on the certiorari petition; applying *Munsingwear* would "eliminate an otherwise unassailable court of appeals opinion";[22] the Court in *Velsicol Chemical Corp. v. United States*[23] merely denied the petition although the *Munsingwear* rule had been requested; and *Munsingwear* is only applicable to mootness that prevents court of appeals review or "review provided as a matter of right".[24] These same four arguments were made by the

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[19]*Webster*, 109 S. Ct. at 3053-54; *Deakins*, 484 U.S. at 199-201.

[20]*Alabama v. Davis*, 446 U.S. 903 (1980).

[21]*Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 94 (1979) (majority criticized the court of appeals for failing to follow the *Munsingwear* rule even though its motive in refusing to vacate the decision was to show its approval of the reasoning of the lower court).

[22]Brief in Opposition at 11.

[23]435 U.S. 942 (1978).

[24]Brief in Opposition at 10 & n.8 (emphasis omitted).

Chicago Board of Trade[25] in two appeals in which it was involved. All four arguments were apparently rejected when this Court, without dissent, followed the *Munsingwear* rule and vacated the Seventh Circuit's decision in both appeals.[26]

CONCLUSION

For the foregoing reasons, this Court should reject AFSCME's opposition, grant the writ of certiorari, vacate the judgment and opinion of the court of appeals, and remand with instructions to dismiss the cause as moot. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950).

Respectfully submitted,

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[25]Brief for the Board of Trade of Chicago in Opposition to the Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, Supreme Court Nos. 82-327, 82-526, pp. 6-18.

[26]*Chicago Board Options Exchange v. Board of Trade*, 459 U.S. 1026 (1982); *SEC v. Board of Trade*, 459 U.S. 1026 (1982).